Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TINA KRAIL, LORI CHADWICK,
DEBORAH SMOLDORE AND JEANNIE HENDERSON
Petitioners

- against -

THE STATE OF NEW JERSEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Once it is recognized that the life of a child begins at conception and the child is a separate, unique, and complete human being, does the child's mother have any true protectible interests which would support a right to intentionally take the life of her own child even before birth under the Fourteenth Amendment of the U.S. Constitution?

2. When does the life of a child begin?

3. Do children possess the natural and inalienable right to live or possess constitutional rights acquired through the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States at any time from conception to birth?

4. Whether it is violative of the natural and inalienable rights of a child or rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States for New Jersey to fail to recognize petitioners' standing to raise the rights of the child under the facts of this case?

5. Does a child before birth possess rights which, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

6. Is it an unconstitutional infringement of Mr. Loce's child's natural and inalienable rights or the child's Fourteenth Amendment Due Process or Equal Protection rights for New Jersey to convict these petitioners of trespass under the facts of this case where the conduct of the petitioners was for the purpose of, and necessary for the defense of the

child's life, and the state's express purpose in prosecution and conviction was to allow the child's mother to intentionally terminate the life of the child?

7. Does a father have a Due Process and Equal Protection Right to defend the life of his child?

8. Whether this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), or other precedent prohibits the Courts of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to prohibit the criminal or quasi-criminal prosecution of petitioners under the facts of this case?

9. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey (through its legislative enactments, executive actions and the acts of its courts) which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioners are Tina Krail, Lori Chadwick, Jeannie Henderson, and Deborah Smoldore, all of whom assisted and aided co-petitioner Alexander Loce in his effort to save the life of his child at his request. Mr. Loce has filed a separate petition on his own behalf. Mr. Loce first instituted a civil suit in the Superior Court of New Jersey on September 7, 1990, seeking an injunction of the abortion of his child. When he exhausted his civil suit that night (New Jersey Supreme Court Justice Robert Clifford denied relief), Mr. Loce attempted to protect the child's life the next day, September 8, 1990, by blocking access to the operating room at the clinic where the child's mother sought to terminate the child's life. He requested the assistance of fourteen other persons including these four petitioners, and he chained himself to them, succeeding in preventing the child's death, until the State of New Jersey removed Mr. Loce and these petitioners from the premises.

Each of these petitioners bring a unique point of view to the Court. All are women who have been touched or harmed by abortion. They provide an important assistance in litigating the question of a woman's rights and those of her child. Tina Krail has had two abortions. Lori Chadwick is a single mother. Jeannie Henderson was seven months pregnant on September 8, 1990 when she was arrested in this case. She carried and gave birth to her baby only after changing her original decision to have an abortion because she learned of information unavailable to her through an abortion clinic. Deborah Smoldore has been active in bringing attention to the fact that abortion is an exploitation of a woman and her child.

Respondent is the State of New Jersey which refused to provide Mr. Loce and his child access to court by dismissing his civil complaint and then arrested, prosecuted and convicted him and petitioners Krail, Chadwick, Henderson, and Smoldore of trespass for defending the child's life. The other ten co-defendants, have not filed a Petition.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1993

No. 93-

Tina Krail, Lori Chadwick,
Jeannie Henderson and Deborah Smoldore

Petitioners

v.

The State of New Jersey

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

Petitioners, Tina Krail, Lori Chadwick, Jeannie Henderson and Deborah Smoldore, respectfully pray that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on October 21, 1993 and the judgment and opinion of the Appellate Division of the Superior Court of New Jersey entered June 30, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The April 29, 1991 opinion of the Municipal Court of Morristown convicting petitioners under N.J.S.A. 2C:18-3 (trespass) is at A-201. The opinion of the Superior Court of New Jersey, Law Division, affirming the convictions is at A-89-106 [630 A.2d 843 (1991)]. The opinion of the Appellate Division of

the Superior Court, dated June 30, 1993, affirming the convictions solely on Federal Grounds, citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) is at A-82-88 [630 A.2d 792 (1993)]. The Order of the New Jersey Supreme Court entered on October 21, 1993 denying Certification is at A-204.[1]

STATEMENT OF JURISDICTION

Petitioners seek a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered October 21, 1993 and the opinion and order of the Appellate Division of the Superior Court of New Jersey, dated June 30, 1993. The Petitioners have claimed rights under the constitution of the United States, all the issues presented were raised below and the jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

[1] These petitioners adopt the arguments of petitioner Loce in his separate petition, especially Point II, the rights of the child. This petition addresses issues unique to these petitioners and elaborates on others.

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The petitioners were prosecuted and convicted for attempting to save the life of Mr. Loce's child. This is an abortion case which requires a determination of whether a state has the power to deny any class of individuals natural and inalienable rights, whether women truly have interests inconsistent with their child's interest in life sufficient to support the right of a mother to terminate the life of her own child, and whether New Jersey's actions are violative of the Constitution of the United States.

A. STATEMENT OF FACTS[2]

On September 8, 1990 petitioners Krail, Chadwick, Henderson, and Smoldore, at the express request of Alexander loce, went to an abortion clinic in Morristown, New Jersey to help defend and protect the life of Mr. Loce's child. They chained themselves to Mr. Loce and succeeded in preventing the child's death until the State of New Jersey removed them from the premises. As a result of the State's action the child's life was subsequently terminated.

[2] These petitioners adopt facts set forth in the petition of Mr. Loce.

These petitioners were thereafter prosecuted and convicted of a violation under N.J.S.A. 2C:18-3(b) (trespass). [A-85-86]

B. PROCEDURAL HISTORY

The presence of these petitioners was necessary for Mr. Loce to successfully defend his child's life, and the New Jersey Courts specifically found that their intention in going to the clinic was to defend the life of the child. The State's purpose in removing and prosecuting them was to permit the termination of the child's life and protect the "right" of the mother to terminate the child's life [A-85-88]. On April 29, 1991 Judge Noonan found, as a matter of fact, that the life of a person begins at conception, and that the eight week old "fetus" was a "person", a "human being", and was a "separate and distinct human being from the mother, was a living person, ... unique and individual" [A-98]. Nonetheless, he convicted the petitioners under N.J.S.A. 2C:18-3(b) because he felt bound by this Court's decision in *Roe v. Wade*, supra, which, he stated "legalized the execution of a human being" [A-200].

These petitioners filed timely appeals at every phase of the appellate process, resulting in the Appellate Division of the Superior Court affirming their convictions solely on federal grounds. The Appellate Division reasoned:

> The rights to an abortion guaranteed by the due process clause of the Fourteenth Amendment established by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, (1973)...has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _ 112 S.Ct. 2791 (1992). The purported rights asserted by defendants independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. The simple and overriding fact is that each defendant committed a petty disorderly persons offense in an attempt to prevent a *legal and constitutionally protected abortion*. [A-86-87]

From the moment the petitioners were removed from the premises of the clinic until the final order was entered in this case New Jersey was acting to further and protect what it perceived to be the constitutional right of a woman to terminate the life of her child. That this Court has never decided when, in fact, the life of a child begins, and whether a child has rights prior to birth (given the now undisputable fact of the child's existence) requires the Court to grant certiorari. The child's rights have never been directly examined by this Court and the child's personal interest in life has never been weighed. Likewise, a mother's true interests have never been identified and examined in the context of the child's actual existence. These issues are presented by this petition.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. _ 112, S.Ct. 2791 (1992), both the Joint Opinion and the Dissent stated

it was necessary *Roe* be reexamined.[3] *Casey*, however, did not reexamine the questions of when the life of a child begins or whether the child possesses constitutional rights prior to birth.[4] As a result, *Casey* failed to reexamine *Roe* in its most critical aspect. If the life of a human being, a child, begins at conception, this fact has a substantial consequence for the legal issues concerning the child's rights [see Loce Pet. Pt. IA & Pt. II]. But this fact has an important relevance to the real nature of a woman's interests as a pregnant mother. It is critical to the child that the child's interest in actual life be recognized,[5] but it is equally critical that the true nature of the real interests of the women of this nation be identified, recognized and protected.

Until now this court has only attempted to balance a very limited set of perceived "interests" of a woman against a poorly

[3] *Casey*, 112 S.Ct. at 2804; Rehnquist, C.J., dissenting 112 S.Ct. at 2855.

[4] Justice Scalia, dissenting, observed the critical importance of whether the child enjoys actual life. 112 S.Ct. at 2875. Justice Stevens alone addresses the question of the child's rights in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

[5] These petitioners adopt the legal argument found in the Loce Pet. concerning the rights of the child and its consequences [see Loce Pet Pt. IA & Pt. II]. These pettitioners elaborate on the mother's protectible interests.

defined "interest" of the states without the benefit of determining whether the child is a human being prior to birth. As a result the "interests" of a mother have not been satisfactorily identified, and their nature never completely defined. The problem stems from the Court's conclusion that it could not, in 1973, reach reliable judgment about the fact of the child's existence (and therefore ignored the child's substantive interest in actual life and the mother's real interests). The fact of the child's existence materially alters the true nature of the interests of a woman. Her interests as a pregnant mother must be taken into account, and they conflict with any "interests" before pregnancy which are inconsistent with those of the child. Ignoring this reality has resulted in harm to the mothers subjected to abortion as a "remedy" to satisfy unprotectible "interests" in conflict with her real ones. [See, Pt. II].

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES AND A LARGE BODY OF NEW FACTUAL DATA SUPPORT THE CONCLUSION THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION. AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE VERY EARLY STAGES OF DEVELOPMENT. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A MOTHER'S PERSONAL INTERESTS ARE COMPATABLE WITH HER CHILD'S INTEREST IN LIFE, AND WHETHER SHE HAS ANY "PROTECTIBLE" INTERESTS WHICH JUSTIFY HER TEMINATING HER CHILD'S LIFE.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in

1973 it was not possible to determine when life began:

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[6] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which reserved that question for a later Court when "man's knowledge" is sufficient. Because *Roe* did not determine when the life of a child began, its legal analysis was irrelevant to questions concerning the child's rights, and also the legal inquiry concerning the nature of a mother's interests protectible under the Due Process Clause, once it is found that the child is a human being prior to birth. [See Loce Pet. Pt. IA]. Because of this expressed inability, *Roe*: [1] ignored what would otherwise have been applicable principles of constitutional interpretation as they apply to the rights of the child [see, IIB Loce Pet.]; and [2] misidentified a woman's true interests to the detriment of the woman of this

[6] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe* dealing with the question of the humanity and rights of the child.

nation [see, Point II below].

2. The Question of the Mother's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, Show that that Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[7] Of particular relevance is the dissent of Justice Brandeis[8] in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause...; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision, ... is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by

[7] The question of when life begins and whether the child has rights prior to birth is one of first impression and *stare decisis* does not apply. If it applies to the interests and rights of the mother, however, there are at least one hundred and seventy-four instances in which this Court has overruled, in whole or in part, its previous constitutional decisions. See Appendix A at A-1-18 bound with Loce Pet. and Loce Pet. p. 10, Fn 6.

[8] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.* 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

> a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a pregnant mother has a protectible interest in taking her child's life under the Fourteenth Amendment and whether a child is a person protected by the Due Process Clause, are both mixed questions of fact and law—this type of determination. In reaffirming that portion of *Roe* which found that the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[9] or moral grounds,[10] and articulated a reluctance to do so [at 2814]. Only two justices were willing to expressly state *Roe* was legally correct. The Court reaffirmed *Roe* based upon *stare decisis* and special considerations because of a divisive national debate. Whether the principles outlined in *Casey*

[9] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, 505 U.S. , 112 S.Ct. at 2817.

[10] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in this case.[11]

B. THE LIFE OF A CHILD BEGINS AT CONCEPTION. THE NUMEROUS AND SIGNIFICANT SCIENTIFIC DISCOVERIES SINCE *ROE V. WADE* SUPPORT THIS CONCLUSION. THERE NOW EXISTS A CONSENSUS IN SCIENCE AND MEDICINE CONCERNING THE FACTS WHICH FORM THE BASIS FOR THIS CONCLUSION. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHEN LIFE BEGINS AND THE RIGHTS OF THE CHILD.

1. Introduction

Since *Roe* was decided in 1973, there has been an explosion in scientific technology which has fundamentally altered the capability and manner in which science acquires knowledge of human development. Science can now investigate human development at the molecular level, using recombinant DNA technology[12] and monoclonal antibody technology,[13] if the instructions (made up of DNA and RNA) to make a particular

[11] This court has never decided the question of the child's rights or those of the mother's in the light of the fact the child is a human being before birth. But even if *Roe* can be considered to have decided the question, two critical distinctions made by Justice Brandeis apply here. First, the problem is not one of interpretation, but rather one of applying a recognized right to specific circumstance. Secondly, the legal question of whether the unborn child enjoys constitutional rights is a mixed question of fact and law as is the question of the protectibility of a mother's interests to terminate the life of her child.

[12] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[13] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985.

protein exist and also if that instruction has been transcribed (read). It can be determined if a specific protein has been produced from specific genetic instruction.[14] These scientific techniques, combined with immunochemistry technology, can be used to show that a particular protein is present in a specific sample and when combined with an appropriate visualization technique, the location of the protein in the sample can be determined. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations. In 1973 a scientist would observe a physical structure such as the cerebral cortex or dendritic spines, and when that structure was not present or was removed, the scientist would observe what appeared to happen (the visual result). Today we can learn what is occurring in human development before we can see specific structures develop. We now look at a human's building blocks, the proteins and instructions that control the proteins, to view what develops at a molecular level, and when it develops. On a macroscopic level, the new technology of ultrasound has accommodated,

[14] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at p. 129.

with unprecedented clarity, observation of the child and the child's reaction to its environment. Advances in electroencephalography have allowed for the early detection of brain wave activity in the fetus. These investigations demonstrate vast increases in knowledge concerning the child since 1973. Many scientists made incorrect assumptions at that time concerning the child's existence as a unique human being from conception, the child's development from conception to old age, ability to react to its environment and to feel pain prior to birth.

The origin and extensive use of the molecular biological techniques since 1973 have dramatically changed the way in which modern biology is conducted. By using DNA probe technology, combined with the Southern Hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with polymerase chain reaction (PCR)[15] it is possible to identify the presence of a specific genetic code

[15] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

material in a sample as small as one cell[16]. The technology can determine genetic uniqueness, research genetic diseases, and observe human development at a molecular level, as never before.

2. The Life of Each Person Begins at Conception.

The life of a human being begins at the moment of conception when the sperm of a father penetrates inside the mother's ovum and all of the genetic material and information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present immediately after conception.[17] Either all the necessary

[16] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

[17] Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. "The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20 millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242; Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development*

genetic information is present for conception of a human being for development to full stages of human growth (after the moment of the entry of the sperm into the ovum) or the genetic information is insufficient, conception will fail and no human being shall

and Personality 5th ed. New York: Harper & Row, 1979. "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52. "Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53. "This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. "Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine form its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. "The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410. "Genetically the zygote is complete. It represents a new single celled individual." Moore K. *Before We Are Born*, 3rd ed. Philadelphia: WB Saunders Co. 1989. "Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25. See, LeJeune, at A-115 to A-124. See also, the numerous authorities found following Loce Pet. at A-19 to A-30.

exist.[18] Not only is it possible to identify this first cell after conception as being human, the individual entity is complete and can be identified.[19] There is without doubt a complete, separate, identifiable human being immediately after conception.[20]

[18] Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584. LeJeune, A-115, 116.

[19] Moore, K. *Before We Are Born*, 3rd ed. Philadelphia W.B. Saunders Company 1989. "Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produce a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26. Turner, J.S.; and Helms, D.B. Lifespan Developmental 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. "Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52 "Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. "You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product from the moment of conception onward."

[20] Moore, *supra*, 26-28; Volpe, *supra*, 18-20. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Clark, J. ed. *The Nervous*

Within the process of fertilization, the egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg.

System: Circuits of Communication In The Human Body. Torstar Books, Inc., 1985. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child*. Homewood, IL: The Dorsey Press, 1977. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982). Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm.[21]

The necessary genetic information to create a human being is created in DNA. Dr. Jerome LeJeune, petitioners' genetic expert at trial described this information as analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that it can be put on the point of a needle. It contains twenty-three chromosomes. The ovum also contains twenty three chromosomes. The interaction of the biological components is like a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud

[21] Moore, supra, at 25.

speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information.[22]

The recent discoveries concerning methylation of cytosine, and development of DNA fingerprinting technology both establish the completeness, uniqueness, irreplacability of each individual human being from the moment of conception. See Loce Pet. at IB.

Molecular biology has present application in the detection of fetal abnormalities and fetal sex determinations through the analysis of the very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood

[22] See, LeJeune, petitioner's appendix A-116 to A-119.

cells of the mother).[23] Using cell sorting technology and DNA probe technology, scientists can now determine, for example, the presence of a child from a sample of 4 ml of the mother's blood.[24]It is an established principle of human genetics and heredity that an individual human's cells all contain the same DNA composition (except sperm and ovum cells)[25] so that the few fetal cells that are found in the mother's bloodstream demonstrate the presence of the unique human existing separately in the mother's womb.

The ability to detect genetic disorders before birth has improved dramatically during the last two decades.[26] The application of

[23] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[24] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[25] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Olds, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

[26] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976.[27]

Another advancement is the use of chorionic villus sampling. It was only in 1982 that its potential use in determining genetic disorders was realized. Because the trophoblastic tissue has the same "genetic constitution" as the child, a sample from the chorionic villi reflects the chromosomal, biochemical, and DNA status of the child. Therefore, the production of trophoblastic tissue is controlled by the child's DNA and not that of the mother. This procedure uses tissue collected in the first twelve weeks of life.[28] "In vitro" fertilization demonstrates that the child is a unique human being from conception. Before implantation the new human being is clearly separate from its mother. During the period after fertilization and before implantation, it has been possible to determine the sex of the child, whose development is started by

[27] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

[28] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

a clear physical separation from the mother and father.[29] The preimplantation diagnosis of certain genetic diseases has also been considered a feasible medical advance.[30] These procedures support the conclusion that pre-implanted human embryo is a genetically unique and complete human being.

The goal in the study of human embryo viability in synthetic culture medium is improved development and pregnancy success. Recently an embryo derived platelet activating factor was discovered, which when added to growth media, has dramatically increased the developmental and pregnancy potential of the embryo.[31] This chemical, a product of the new human, supports the conclusion that, even before implantation, there is an independent, unique human capable of producing substances that enhance its own survival. The "fetus" is not "part of" a "woman's body." If it were the mother's body would control the child's genetic growth

[29] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[30] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[31] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

and development. Using modern molecular biology technology, not available in the 1970's, it has been found that by the third cell division after fertilization control of growth and development has been established by the child's DNA.[32]

In 1981 the Subcommittee on Separation of Powers of the Judiciary Committee of the United States Senate conducted extensive hearings on the question of when life began based upon the knowledge of science at that time. The committee concluded:

> ...Life of a human being begins at conception ... today the facts are beyond dispute ... physicians, biologists and other scientists argue that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings.[33]
>
> There simply is no credible evidence to refute this conclusion.[34]

3. The Child Experiences Pain Shortly After Conception.

Studies have resulted in data and information which show that the child is subjected to great pain during an abortion, and as early as eight weeks after conception.

(a) The New Technology and Pain Transmission.

[32] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

[33] Report on Human life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[34] See Loce pet. IB; see list of authorities in appendix following Loce pet. at A-19 to A-30 that concludes that life of the child begins at conception.

Development of techniques of monoclonal antibody production, first described in 1975 using mouse material and then further developed to allow the production of specific human antibodies in the early 1980's[35], has complemented DNA and RNA studies which are the subject of Molecular Biology, by allowing for the specific detection and location of individual proteins or peptides in a human cell sample. Monoclonal antibody technology[36], and recent developments in modern protein chemistry and electrophysiology, are being applied to human developmental neurobiology. Initially applied in the mid 1980's, the new techniques were recognized as having the potential to revolutionize our understanding of the human nervous system at it's inception. Scientists recognized that with the new technology they could investigate nervous system function and development at the molecular or chemical level, no longer limited to observations of the histological presence of nerves and other gross functionality. This technoiogical application

[35] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

[36] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

shows that the classical histological and functional criteria for defining (nerve) cell types was oversimplified.[37]

One result was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since 1973 similar substances have been found to be present in nerve fibers. This discovery was described in 1985 as revolutionary.[38] These neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two important neuropeptides are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[39] The detection of these two neuropeptides in samples of human tissue has been used to define and locate nervous system development and function in the human being

[37] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[38] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[39] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

from the time of conception. Due to accelerated pace of study since 1985, the study of neuropeptides disclosed a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which were available in the 1970's.

The crude ultrasound devices available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which depicts movement and function such as breathing, urination, swallowing and other functions of the human existence. This visualization permits diagnosis of a child's illnesses while in a mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to

five months.[40]

(b) Fetal Pain.

Since the time of *Roe v. Wade* there have been a number of generally accepted assumptions about human neurological development and our ability to feel pain that have been refuted. [Loce Pet. IB]. Since 1981, the field of fetal surgery developed dramatically. It is common practice to monitor fetal vital signs and to give the fetus anesthesia.[41] "Although the mother is anesthetized for fetal surgery, the fetus becomes the prime target for the anesthesia."[42] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient,

[40] See, Nathanson at A-155 to A-157. See also subsection (b) below.

[41] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

[42] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[43] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased motor activity, and variations in heart rate.[44] Anesthesia is used in fetal surgery on children as young as 18 weeks gestation,[45] the earlier time medicine can presently perform fetal surgery.

(c) Non Myelinated Nerve Fibers Transmit Pain.

The old assumptions adopted in 1973 about the child's ability to feel pain were simply wrong. The assumptions the neonates could not feel pain, that mylineated nerve fibers were necessary for pain perception, that pain experience required pain detecting nerves connected to the tholanerves end them the brain cortex, and a permit of cortical maturation were in error. They were based upon gross histological observation with no knowledge of neuropeptides, their detection and formation, without the benefit of modern

[43] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[44] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[45] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

methodologies and technologies developed in the last decade.[46] It is now clear that a child is capable of experiencing pain as early as six to eleven weeks after conception.[47]

II. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE.

A. NATURE AND SCOPE OF THE MOTHER'S REAL INTERESTS.

The most obvious implication of the new scientific and medical information which supports the conclusion that the life of a child begins at conception is that the child has a personal interest in life, an interest never before specifically identified or weighed by this Court which requires recognition of a corresponding natural and inalienable right to life of the child.[48] The fact of the child's human existence has equally profound implications for the interests of a woman carrying her child in utero.

Roe identified what it perceived to be a woman's interests the court sought to protect. However, the newly obtained scientific data concerning the child's humanity and the information about the

[46] See Loce pet. p. 14-16; see also, amicus brief of World Federation of Doctors.

[47] See Loce pet. p. 21-30; see also amicus brief of World Federation of Doctors.

[48] These petitioners adopt and incorporate those arguments on the child's rights found in the Loce Pet., Pt. II at p. 30-40.

substantial harm to women due to abortion, now available, reveal that identification of a woman's protectible interests by *Roe* was materially deficient. Because it is the existence, nature, and "protectibility" of any of these interests which constitute the necessary basis for a right, their proper identification is critical.

The *Roe* Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. The first, judgments when a mother's life is in danger is not implicated in this case.[49] The other concerns listed by *Roe* are: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe*, at 153. These may be concerns that implicate the right of privacy, but they only concern decisions before a woman becomes a mother. New Jersey does not have a compelling interest to interfere with the decision of a couple concerning conception. *Griswold v. Conn.*, 381 U.S. 479 (1965). However, once a mother conceives and her child is in

[49] In this case it was stipulated by the state that the mother's life was not in danger and conception was the result of consensual relations between a couple engaged to be married. Therefore, there is no need to address this interest of a woman in this criminal prosecution of Mr. Loce.

existence her personal interests are quite different.

Even if it were perceived that a woman, or couple had an "interest" in avoiding the obligations of parenthood even after the child comes into existence, those "interests" could never be protectible in a constitutional sense. It is not sufficient that one merely state a "need," a desire, or have some expectations. There must be a legitimate claim of entitlement for which there is an independent source. It is the underlying nature of the "interest" which must be examined. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Montanye v. Haynes*, 427 U.S. 236, 242 (1976). *In Roth, supra*, this court explained:

> ...the range of interests protected .. is not infinite ... We must look to see if the interest is within the Fourteenth Amendments' protection of liberty... 408 U.S. at 569, 571.

The determining factor is the underlying nature of the precise interest, not that there is a "grievous loss", but an interest of the protectible kind. *Morrissey v. Brewer, supra*, at 481; *Board of Regents v. Roth, supra*, at 569-574. The interest must have a source in law to be protectible. *Meachum v. Fano, supra*, 224-227; *Montanye v. Haynes, supra*, 242.

The true nature of a woman's interest must be scrutinized in view of the fact of the child's existence and the harms to a mother which have come to light during two decades of experimentation with abortion. No matter which rhetoric is used to characterize a mother's or couples "interest" to avoid the obligations of parenthood once the child is in existence, the "interest" [in "abortion" or "choice"] is, in fact, an "interest" in terminating the life of a human being, a child. The interests found in *Roe* no more justify terminating the life of the child before birth then they would if a parent took the life of an infant two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting).[50]

[50] If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself. See IIC & IID below.

Casey elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute

When a woman or a couple conceive the interests listed in *Roe* are no longer irrelevant. The key difference is the fact that the child exists. Even if a mother claimed an interest in terminating her child's life, it is not protectible because it is perfectly repugnant to her traditionally recognized and protectible interests including her interests in her child's actual life, and her relationship with the child [see, IIC and IID below].

B. Identifying the Real Nature of the Life in Question.

The fact that the child is a human being is pertinent to the interests of the mother. The *Roe* court's stated inability to determine when the life of the child began impaired its ability to accurately identify the true interests of the critical participants. As a result, ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest" and those of the mother. The Court most

form. *Casey* recognized that the responsibility for the avoidance of this experience, if desired, rests upon the mother before they are realized. The same reasoning applies before conception. 112 S.Ct. at 2817.

often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).[51] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; *and depending on one's beliefs, for the life or potential life that is aborted. Casey*, 505 U.S. ___, 112 S.Ct. at 2807 (emphasis added).

This reflects the failure of the Court to reach a conclusion concerning the nature of the life. Either this is a human being or it is not. It is not a "belief", religious or otherwise. It is a matter of fact. This determination affects the nature of a mother's right. If

[51] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

she is killing her own child or not is material, if not decisive.

C. Once a Woman Conceives and her Child Exists her Personal Interests are Consistent with the Interests of her Child.

Once a woman conceives she has at least seven interests not identified in *Roe*, none of which are inconsistent with her child's interest in life, and all conflict with the *Roe* "interests." The first three, although distinct, are closely related. First, she has a personal interest in her protected relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986). The fact that the child is a human being distinguishes two separate sets of interests: those which form the basis for her fundamental right to the companionship with her child — and those which form the basis for her *Griswold* rights. Her relationship with her child exists and is protected during pregnancy. C.F. *Lehr, supra*. No government could demand she terminate that relationship without due process. *Santosky, supra*. The nature of this right is to preserve the life of the child and their relationship. It is not possible that her companionship interest,

because of its nature, entitles her to terminate the child's life because the existence and preservation of that right hinges on the child's welfare.[52] A mother's relationship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection. Although the mother and child are

[52] The nature of the mother's right to the protection of her relationship with her child is best understood by examining the constitutional principles concerning the termination of those protected rights. Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possesses a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. A natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*. In *Quilloin, Lehr* and *Michael H.* however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a parent's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero,[53] creates a human relationship which may be the most rewarding in the human experience. Preservation of the benefits, beauty, and joy of that relationship is one of the greatest interests a woman possesses in all of life.

The fact that she is the parent who carries the baby clearly distinguishes her circumstance (and her role in reproduction) from

[53] Recent studies demonstrate that a mother's bond with her child [and the child's attachment to her] begins during pregnancy and even at its early stages. Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2 (1982); Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). Breaking this bond by abortion is detrimental to the health of the mother. See, Ortof, Edna, "Psychological Aspects of Abortion" in *Psychological Aspects of Pregnancy, Birthing and Bonding*, Blum, Barbara L., New York: Human Sciences Press (1980). This unique mother-child relationship, with the developing bond and attachment benefits both the child and mother. Klaus and Kennell, at 3. While at the same time the bond helps the mother to transfer her interest from herself to her child, and therefore prepares her for her unique role in the child's life. Sugarman, "Parental Influences in Material Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). This accounts for the fact that a mother is the principle attachment figure for a child. Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969).

Studies have demonstrated the subjective and conscious awareness that mothers have concerning their bonding with their children during pregnancy. In the second trimester 63% of women expressed attachment with the child and 92% expressed such attachment during the third trimester. Some women even expressed the attachment during the first trimester. Lumely, "Attitudes to the Fetus Among Primagranides" *Australian Pediatric J.*, 106, 108 (1982). Mothers talk to the fetus and stroke it. Id. at 109. The ability of the mother to make a correct assessment of the size, shape and movement of the baby increased as the pregnancy proceeds as does the sense of the separateness of the baby. Id. at 108. Increased sensitivity to the child follows experience of "quickening" when women can feel the baby move. Klaus and Kennell, *supra*, at 13; Leister, "Physiological Effects of Motherhood," at 76 (1980).

that of the father. But the fact that her contributions are different from (and at this age of the child, greater than) his do not make her interest inconsistent with those of the child. If anything, it creates the cherished right to protection of their relationship.[54] The fact that the mother is the parent who carries the child has always been considered material to her rights following birth when she is competing for custody. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter of Baby M*, 537 A.2d 1227, 1261 (1988). Therefore, the fact that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights.[55] The

[54] The New Jersey Supreme Court has observed, concerning the mother's relationship with the baby she carries: "...we think it is expecting something well beyond normal human capabilities to suggest that [a] mother should [part] with her newly born infant without a struggle. Other than survival, what stronger force is there? ***Matter of Baby M***, 109 N.J. at 459.

[55] This court's opinion in ***Southeastern Pa. v. Casey, supra***, is not inconsistent with this understanding of the mother's interests because *Casey* never addressed the humanity of the child. *Casey* only examines the question of whether a father

fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights and inconsistent with her interest in protecting her child's life. The privacy right to preserve the mother-child relationship child cannot co-exist with the right to kill the child. They are repugnant.[56]

may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. A father never has an interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and their relationship. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights and is the result of this Court never having determined when the life of the child begins. (See footnote 52 above).

[56] The fact that a mother's interests in her child's life and her relationship with the child prior to birth are repugnant to a perceived "interest" in killing the child [and therefore mutually exclusive] through abortion is reflected in some modern feminist literature. In her book, *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed., 1988, Phyllis Chesler observed this conflict, stating that the "sacred bond" of a mother and child cannot be sacrificed for a right to destroy that relationship.

> Some feminists say: "If women can't do what they want with their bodies, then we'll lose our right to abortion and pay equity." I hope not, but must women give up the right to keep our children -- a right we don't yet have -- for the right not to bear children?
>
> Some feminists say: "Patriarchal motherhood has enslaved and destroyed women-who in turn have emotionally wounded their own children. There's nothing sacred about biological reproduction or motherhood. They're examples of devalued and alienated unpaid labor. Let's organize for wages and better working conditions and get men involved in mothering. At the very least, male mothers will upgrade women's status as childcare workers."
>
> *Perhaps, but how can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero; that it is further strengthened by the experience of childbirth, breast-feeding and primary childcare, and by the socialization into motherhood that women (not men) receive?*
>
> *How can we deny that children bond with their birth mothers in utero*, and that children suffer terribly in all kinds of ways when this bond is prematurely or abruptly terminated?
>
> Acknowledging these truths does not doom women to the status of surrogate

Fourth, she has an interest to avoid the risk of physical and psychological harms to which she is subjected when abortion is used to satisfy interests that may have existed only before she becomes a mother. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when she acts against her interests by taking her child's life. This method of the destruction of the mother-child relationship places a woman at substantially increased risk for breast cancer. The first uninterrupted pregnancy causes a sequence of hormonal changes which permanently alter the cell structure of the women's breast. During the first full pregnancy, the breast changes from an immature organ to one which is fully functional. Abortion of a first pregnancy interrupts the transformation within the breast. Indeed, abortion terminates this process, leaving millions of breast cells suspended in transitional states where they face exceptionally high risks of turning cancerous.[57] In addition, abortion places women

uteruses-or men to the status of sperm donors. Patriarchal "civilization" has already done so. *Sacred Bond*, at 22-23. [Emphasis added.]

[57] See: Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcino-genesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol*, 100:497-451; Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast*

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[65] Reardon, *Aborted Women - Silent No More,* Chicago: Loyola University Press, 1987; Franache, *The Ambivalence of Abortion,* New York, Random House, 1978; Speckhard, H. (1987), *Psycho-Social Stress Following Abortion,* Kansas City, MO: Sheed & Ward.

[66] Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" Omega 18:1 (1987), 1-12; Reardon, *Aborted Women - Silent No More, supra;* Reardon, "Criteria for Identification of High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 Aborted Women," supra; Bowlby, J., *Attachment and Loss,* London: Hogarth Press (1980); Harris, Betty G., "Induced Abortion" in *Parental Loss of a Child,* ed Rando, Theresa A., Champaign, Ill: Research Press Co., (1986); Kuenning, Delores, "'I Killed My Baby' The Emotional Aftermath of Abortion" in *Helping People Through Grief, When a Friend Needs You,* Bethany House Publishers, Minneapolis (1987); Upton, Julia "Hidden Grief of Abortions" in *Pastoral Psychology,* 31(1): 19-25, Fall (1982); Shoor, M. et al., "Delinquency as a Manifestation of the Mourning Process" in *Psychiatric Quarterly,* 37:540-558.

disorders;[67] [11] and other physical and psychological injuries too numerous to detail.[68] Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply "ennoble" her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. A legal policy which denigrates her role in carrying her child is not one which actually protects her interests but destroys them. There is a difference between the experiences of women and men in the role of reproduction that must be accounted for to define a women's true interests.[69] The insistence by society that

[67] Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology,* 87, 1115-1622; Akron Pregnancy Service, supra; Freemard, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology,* 55, 5, 625-635.

[68] Many of these harms are inherent to abortion or the breaking of the mother-child bond developed during pregnancy, such as the grief reactions in abortion (so characteristic to birth mother separated from their children after birth). See, generally, Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; the other injuries cited above are inherent in the abortion conduct because it acts against the natural interests of the mother. The study in two Canadian provinces which found that 25% of "aborted" women made visits to psychiatrists as compared to 3% of the control group is typical. See, Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottowa: Supply and Services*, 313-321.

[69] A woman's sense of personhood is most often grounded in her relatedness to others. Women tend to find satisfaction, pleasure, effectiveness and a sense of worth if they experience their life activities relating to a sense of connection with others. This sense of connection leads to an increase in vitality, aliveness and energy. Women also have a heightened sense of empathy and this ability enhances rather then diminishes them. Miller, *New Physiology of Women* (1986). Women tend to focus more on their relationships to others. These chracteristics

women conform in their conduct in the ways expected of men ignores and denigrates the experience of the mother during pregnancy.[70] To pretend that she can deny her true experience to meet these expectations is not only insulting but cruel. To establish a formal policy which chooses to protect the destruction of her relationship with her child instead of a policy which clearly protects it is a denigration of women, because a policy which infers it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited by societal pressures which destroy her interests as mother as a method to

are associated with her bonding and reproductive functions. Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). Gilligan, *In a Different Voice*, at 23 (1982), writes that the elusive mystery of women's development lies in its recognition of the continuing importance that attachment has in the human life cycle. Gilligan, supra, at 9-10, noted that there are differences in the ways men and women define themselves in relationship to others. Women seem more comfortable speaking of the relationships that sustain them. Thus the emphasis on relationship found in women will tend to enhance bonding, while the emphasis on separation and independence in men will tend to minimize the importance of bonding.

[70] A male dominated society prized autonomy and independence; the goal of development was total independence. Women's development and role as mother often did not follow this trajectory. Miller, *What do We Mean by Relationships*, 22 Work in Progress, Stone Center, Wellesly College 1, 16 (1986). The mother's bonding process and her experience being different from that of men must be accounted for. See, Miller, *New Psychology of Women*, at 140 (1986). See Hoeissman, M. et al., "Sex Differences and the Epidemiology of Depression" in *Archives of General Psychiatry*, 34: 98-111 (1977).

satisfy the interests of third parties, including the State, the father,[71] and others, who may have personal interests inconsistent with those of mother and child. Abortion is an exploitation of women. It treats the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands that she detach herself from her experience and her bond, love, and sense of duty to herself and her child.[72] It expects a mother to prevent the bonding process despite the fact that this natural process is both

[71] Many abortions are at the urging of the father who does not have to live with the experience of pregnancy, bonding, love of child, and abortion. See studies of abortions as result of pressure from the father, Shostak, A., et al., *Men and Abortion, Lessons, Losses and Love*, New York, Proejen, (198); Lien-Mak, F., et al., "Husbands of Abortion Applicants: A Comparison with Husbands of Women Who Complete Their Pregnancies" in *Social Psychiatry* 14:59-64 (1979) [the authors of this Hong Kong study warns "our study has served to emphasize the important role that the husband plays in abortion seeking ... it is high-time [to] give substance to the shadowy figure [of] the male partner"]; See also, Rue, V., "Abortion in Relationship Context" in *International Review of Natural Family Planning* 9:95-121 (1985) (abortion serves the purpose of the erotic complulsive male who seeks self-esteem through sexual "achievement").

[72] Feminists who oppose abortion see it as a male institution which encourages and even forces a woman to act irresponsibly, against her self-interest, her dignity and self-worth, just as men often do in reducing women as "sport" and "entertainment." Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife,* (1993) Vol. XIII, 1, p.1, 5; Some of the greatest feminist leaders, such as Susan B. Anthony, deplored abortion as an exploitation of women, calling it "child murder," [The Revolution, 4(1):4 (July 8, 1869)] and the result of the use of women as sport [Anthony, Marriage and Maternity," *The Revolution,* 4 (1)4, 1869].

psychological and physiological.[73] It *uses* the mother as a sexual object without regard for the harm abortion can cause her.[74] It allocates all of the risk, guilt, physiological and physical pain to her and further isolates her in her distress in circumstance of an unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.[75]

Perhaps worst of all is the fact that a mother is deprived of any meaningful consent to the destruction of her cherished and sacred relationship with her child. In circumstances where mothers express their intentions during pregnancy to terminate their relationships with their children, no state permits enforcement of

[73] "Men tend to take abortion lightly; they...fail to realize the values involved. The woman who has recourse to abortion is disowning feminine values, her values...Women learn to believe no longer in what men say...the one thing they are sure of is the rifled and bleeding womb, these shreds of crimson life, this child that is not here." Simone deBeauvoir, *The Second Sex*, 1952; "Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism." Adrienne Rich, *Of Women Born*, 1976.

[74] "It is typical of the contradictions that break women's hearts that when they avail themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege. Abortion is the latest in a long line of non-choices that begin at the very beginning with the time and the place and the manner of lovemaking..." Germaine Greer, *The New Republic*, interview, October 5, 1992.

[75] See discussion of psychiatric harm above. Dr. Alice Ruben Stockharm wrote of this isolation. See, Stockharm, A., *Takology* (1887), p. 247.

a mother's oral *or written statement to surrender her child until* after birth because, in every instance, regardless of the counseling, her decision, before actual birth, is uninformed. The New Jersey Supreme Court has found that any promise or decision by a mother to terminate her relationship with her child made before birth is uninformed as a matter of law. *Matter of Baby M*, 537 A.2d 1227, 1248. That court has made it clear that when it comes to the cherished relationship between a mother and her child, during pregnancy, no consent concerning the termination of that relationship can be recognized: that there are in a civilized society some relationships too important, too sacred, for that society to impose its collective power to assist in the destruction of that relationship, regardless of the beliefs of a mother in a moment of crisis or vulnerability. *Matter of Baby M*, 537 A.2d at 1249-1250. If that is true where a mother gives birth, it is more so where she irrevocably kills her own child and must live with the consequences.[76] Abortion also fails to recognize the reality that most women who originally intend to surrender children to adoption (be-

[76] When a woman is in crisis her "consent" is invariably "uninformed" in any true sense. C.f. Hardison, J.E., "Uniformed Consent and Terms Within Definitions," in *American Journal of Medicine*, 74:923-933 (1983).

cause of the *Roe* "interests") change their mind. Abortion is repugnant to every policy that New Jersey has adopted to protect and preserve a mother's relationship with her child-policies created to protect her interests as well as the child's.[77]

Seventh, she has an interest in having the law extend to her dignity and respect by recognizing that she is capable of living with dignity in the family, commercial and professional life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot be happy in life without an exclusive "right" to terminate the life of her own child.

D. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD—AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHER'S AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF.

Once the fact of the child's existence is recognized, a perceived

[77] All of these harms that befall the mother is actually done to accommodate society's sexual exploitation because it was easier for that society to create an industry of abortion than to correct the underlying exploitive conduct that results in unplanned pregnancy.

"interest" one may assert to terminate the life of a child, at any age of development, cannot be an interest protectible under the due process clause of the Fourteenth Amendment because: [1] all established law and tradition protects the child, and a mother's relationship with her child; [2] taking the life of the child is completely opposed to the fundamental policies and purposes of those traditional protections—protections that form the core of all civilized society; and [3] a destruction of the protections of the actual life of a child and a mother's relationship with her child is a violation of the basic purposes for which government was established.

1. The Traditional Protection of the Child.

One of the greatest and most important functions served by the state is the protection it has traditionally provided the children within its borders. In its exercise of its *parens patriae* jurisdiction, New Jersey has traditionally protected the family unit, and its continued maintenance to advance the welfare of children. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986); *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A.2d 1227 (1988).

When, however, a family separates, the overriding interest is the welfare of the child, so that a custody dispute is resolved based upon the child's best interests. *Fantony v. Fantony*, 122 A.2d 593

(1956). Even when the fundamental constitutional right of a parent to the companionship of her child is threatened by termination of all parental rights, the ultimate question is harm to a child, so if there is likely harm of a certain magnitude those rights will be terminated. *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986).

This focus upon the welfare of a child, even when the traditionally protectible rights of parents are terminated, is consistent with the opinions of this Court which have scrutinized state terminations of parental rights protected by the Fourteenth Amendment. *Santosky v. Kraemer*, 455 U.S. 745 (1982); See, and compare, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Stanley v. Illinois*, 405 U.S. 645 (1972) [see n 52 above]. An alleged "interest" of a parent to harm, or which is harmful to, a child, is simply not part of the protected parental rights under the Due Process Clause of the Fourteenth Amendment.

Traditionally, New Jersey protects children even during pregnancy, under its *parens patriae* jurisdiction, against a parents' conduct which threatens the child's life. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (1964).

Indeed, New Jersey traditionally recognized that a child's life

begins at conception and the child enjoys the right to live, prior to birth, under the state constitution. The child's actual existence from conception was recognized in *Smith v. Brennan*, at 157 A.2d 497, 501-503 (1960):

> ...a child is in existence from the moment of conception and not merely a part of its mother's body. 31 N.J. at 362. It is clear ...that before birth an infant is a distinct [human being] and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth. 31 N.J. at 364.

In *Raleigh Fitkin, supra*, New Jersey found that the child's rights were personal to the child, and, as a separate human being, the court appointed a guardian ad litem. 201 A.2d at 538. This holding reflects the child's constitutional right to life under Art. I, Sec. I of the state constitution:

> The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor..it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life... *Gleitman v. Cosgrove*, 227 A.2d 689, 693-694 (1967).

Even after Roe was decided, the New Jersey Supreme court reaffirmed the child's constitutional right to live prior to birth under the state constitution and the state's policy of protecting life:

> One of the most deeply held beliefs of our society is that life...is more precious than nonlife (citation omitted)...concrete manifestations of this belief are not difficult to discovery. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The Federal

> Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART. 1, SEC. 1. The declaration of independence states that the primacy of man's *'inalienable' right to life is a 'self-evident truth.'* Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 404 A.2d 8, 13 (1979) (emphasis added).

As recently as 1992 the New Jersey Supreme Court reaffirmed that portion of *Gleitman, supra*, which held that the state constitution extends a right to live to children prior to birth:

> In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that, '[e]ugenic considerations are not controlling,' ibid., noting that considerations of financial burden to the father and convenience of the mother *did not outweigh the child's right to live, albeit imperfectly.*" *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J. 1992). (emphasis added)

2. The Traditional Protection of a Mother's Relationship with Her Child.

New Jersey has a strong and long standing policy to protect a mother's relationship with her child during pregnancy,[78] which protects against the destruction of the mother's relationship with her child and the exploitation of the mother during pregnancy. The fundamental policy of New Jersey's adoption laws is to preserve

[78] The deep rooted respect for this relationship is found in western literature replete with statements that recognize that this relationship is at the heart of an ordered culture. It is "the nearest and dearest" known to mankind. Aeschylus, "Eumnides" translated by George Thompson, Greek Play's in Modern Translation (Dudley, Fitts, ed. 1947) at 130.

the relationship of a mother and child during and after pregnancy and protect it against exploitation and undue influences. *Sees v. Baber,* 377 A.2d 628 (1977); *Matter of Baby M,* 537 A.2d at 1248-1250; *A.L. v. P.A.*, 517 A.2d 171 (A. D. 1986). Likewise New Jersey protects a mother's relationship with her child from exploitation, pressures and inducements of surrogate contracting arrangements even when she had promised to conceive and carry a child for another couple, and terminate her relationship after birth. *Matter of Baby M,* at 1248-1250. This protection is based upon the long standing policies which protected the mother's relationship even after her promises, made before or during pregnancy, to surrender her relationship, whether it be to adoption or under the terms of a surrogacy arrangement. New Jersey refuses to enforce such a promise because a decision by a mother to terminate her relationship with her child, made during pregnancy, regardless of counseling, is uninformed as a matter of law. *Matter of Baby M,* at 1248.

When parents are separated at a child's birth, and they disagree on custody, New Jersey's strong commitment to preservation of the mother's relationship requires that the child must initially be left in the custody of the mother (if she desires it) unless there is

a clear showing that the child will be harmed because the mother is unfit. Id., at 1261. This policy is based upon the recognition that the interests of a mother and her child are the same in their mutual need to further nurture their relationship. Id. at 1261. In short the relationship between a mother and her child, at every stage of development of the child, is the most cherished and best protected in all of the human experience. The New Jersey laws against abortion were designed to protect the mother's interests as well as the child's. See, *N.J. v. Novak*, 121 A.2d 521 (1956); *N.J. v. Siciliano*, 117 A.2d 490 (1956); *N.J. v. Colmer*, 122 A.2d 325 (A.D. 1957); N.J.S.A. 2A-87-1.

The relationship and benefits a mother derives from it are too important, too sacred to destroy it at all, but especially where it is destroyed in crisis, under pressure, by inducement or threat, or in the circumstance where it is impossible for her to truly appreciate the nature of her act. Any method of termination of a mother's relationship with her child before birth is contrary to all existing law and policy in New Jersey.[79]

[79] In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), the interest of a mother in her child's relationship was eloquently described:

"[the law protects] the profound importance of the bond between a parent and child to the emotional life of each. *Frequently each party to the relationshp*

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible.

An "interest" of a mother to terminate the actual life of her child has no source in law or the traditions of this nation and therefore not protected by the Due Process Clause. See, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Ruckalhaus v. Monsanto Co.*, 467 U.S. 986, 1001-1003 (1984); *Codd v. Velger*, 429 U.S. 624, 628 (1977); *Ingrahm v. Wright*, 430 U.S. 651, 672-673 (1977); *Webb's Fab. Phar., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Smith v. organ. of Foster Fam.*, 431 U.S. 816, 838-847; 858-863 (1977).

The "interest" of a mother in terminating her child's life is not merely without "an independent" source, it is directly opposed to all of the interests of a mother and child which have always enjoyed protection. The repugnant nature of this "interest" precludes it as "protectable" because, by necessity, it destroys the natural right to life of the child and the fundamental rights of the mother

depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlement, the parents right to the preservation of his relationship with his child *derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.*" 707 F.2d at 599 (emphasis added).

in their relationship. *Smith v. Organ. of Fos. Fam.*, 431 U.S. at 846. In *Smith*, the majority observed that for one to have a recognized liberty interest, it cannot operate to "derogat[e]" the substantive Due Process right of another. 431 U.S. at 846. (See also, concurring opinion of Justice Stewart, 431 U.S. at 856-863).

Neither *Roe* nor *Casey*, although protecting an "interest" in abortion, recognized an interest in actually killing a child.[80] A government which expressly authorizes or participates in the termination of a child's life has failed to perform the legitimate function for which it is created. The purpose and duty of the government is to protect its people and the life of all within its jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885) [see Loce Pet. Pt. II].

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it ex-

[80] Even if such an interest were "protectible", which it cannot be, it could never outweigh the child's right to live. See and compare, *Zacchini v. Scipps - Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

ists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life—she is the trustee of it.

III. CONVICTION OF PETITIONERS CHADWICK, KRAIL, SMOLDORE AND HENDERSON IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF THE CHILD AND THEIR OWN RIGHTS TO THE EQUAL PROTECTION OF THE LAW.

These petitioners have the standing to raise the rights of Mr.

Loce's child. "Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

> Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to herself, and [2] that, under the circumstances present, the injured parties whom they seek to represent would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The policy underlying these requirements was best stated in *Singleton v. Wulff*, 428 U.S. 106 (1976). With respect to the first requirement *Singleton* states:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least

> can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. 428 U.S. at 114, 115.

Here petitioners sought to protect the child's life, the defense of which is the very core of the child's right in question. It matters not that they were prosecuted under a trespass statute: the Appellate Divsiion found that the activity in which they engaged was the direct act of preventing the death of the child. They were convicted for preventing the "abortion". The Appellate Division stated that its refusal to recognize petitioners' otherwise valid defenses was the Appellate Division's effort to protect the mother's conduct in terminating the child's life. [A-87, 88]. The state's act of removing the petitioners from the clinic was to allow the termination of the child's life. The petitioners had stopped the termination until the state intervened. All of the states actions, the removal of the petitioners from the clinic, their prosecution and conviction, was for the sole purpose of advancing and protecting "the mother's right" to kill the child [A-87, 88]. The harm to petitioners which satisfies the first requirement of *Singleton* is obvious in petitioners' conviction for protecting the child. The

second requirement of *Singleton* is totally satisfied. Unlike every other case decided by this Court, if standing is not recognized in the petitioners (or other persons similarly situated) then the rights of this class of children could never be raised. The parties whose rights are sought to be protected must rely on others to prosecute their rights.

As Singleton points out, one of the reasons for the standing requirement is that the third parties [the possessors of the rights in question]:

> Usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. 428 U.S. at 114

So the effectiveness of the petitioners as advocates of the child's rights is a factor. However, here the court does not have the luxury of holding out for the third parties as the *most effective* advocates, because the children always depend upon someone in the position of the petitioners to litigate their rights for them. The question then is not if petitioners are the *best advocates*, but whether they are effective. Their personal harm, and the fact their activity directly involves the act of protecting the child's rights, renders them effective. However, their unique personal status as four women who have been harmed by abortion brings an insight

concerning the true interests of women and abortion as an exploitation of women that is absent without their litigating the child's rights. They may be the *most effective advocates* of the child's rights because of their sensitivity to and understanding of the relationship between mother and child and the harm to women when this relationship is destroyed.

This Court has never held that a defendant in a prosecution cannot raise the rights of another even if the possessors of the right are capable of litigating their rights, and even where others (such as Mr. Loce) were in the same case also prosecuting the rights of the third party. Only a showing that the child's rights would be adversely affected, not entirely denied, is sufficient for an acquittal of the petitioners. The harm to petitioners (conviction) and the total denial of the child's rights are sufficient.

In *Singleton, supra*, a doctor was *merely threatened* with the loss of money, and the persons whose rights he sought to protect were capable of litigating their own rights. The mere "chilling" of the women's ability to assert their right was sufficient infringement to condemn the State's action. In *Doe v. Bolton*, 440 U.S. 179 (1973) a Georgia statute which *merely threatened* prosecution of a doctor was declared by the Court to be an unconstitutional

infringement of a "patient's" rights despite the fact that [1] the doctor was not himself prosecuted, and [2] pregnant women were themselves parties to the very action. The combination of the mere threat of prosecution to the doctor combined with mere "restriction" of the women's rights rendered the statute against the doctor unconstitutional. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the prosecution of the Executive Director and Medical Director of a clinic was declared to be an unconstitutional deprivation of the privacy rights of couples. This Court, in short, has held that if a state's interest intrudes upon or violates an individual fundamental right it cannot form the basis of a criminal conviction. By removing petitioners from the premises and charging them with trespass the State acted in violation of the child's rights and impermissibly interfered with their own right to equal protection of the law.[81] The prosecution of petitioners therefore, operating as

[81] Refusal to recognize the petitioners' standing to raise the child's rights would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. New Jersey extends the defense of a defendant's act as being necessary to defend the life of others in every other instance, and the conviction of the Krail petitioners is solely based upon the classification of persons only on their status as "unborn". See affirmative defenses for protecting other persons under *N.J.S.A.* 2C:3-5; *N.J.S.A.* 2C:32-2; *N.J.S.A.* 2C:3-10; *N.J.S.A.* 2C:30-8; and *New Jersey State Constitution Article 1, Section.1* (right to defend life). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

a complete bar to the assertion of the child's rights is clearly an unconstitutional deprivation of those rights. These petitioners, it should be noted, acted in concert with the child's father, at his request, and he could not have protected the child's life without their help. Petitioners' standing and those of Loce are interwoven and the considerations unique to Mr. Loce by virtue of his relationship with the child support the standing of petitioners Chadwick, Krail, Smoldore and Henderson. [See, Loce Pet. pt. IV]. If this Court recognizes the standing of doctors who assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of petitioners who aid a father to protect and defend the child's life.

CONCLUSION

The issues presented by this petition have never been directly decided by this court. The public importance of the issues requires that the court grant certiorari to decide them.

RICHARD COLLIER, ESQ.

HAROLD J. CASSIDY, ESQ.

RICHARD TRAYNOR, ESQ.